

JONES DAY

222 EAST 41ST STREET • NEW YORK, NEW YORK 10017.6702
TELEPHONE: +1.212.326.3939 • FACSIMILE: +1.212.755.7306

April 14, 2015

VIA ECF

Hon. James L. Cott
U.S. District Court for the Southern District of New York
500 Pearl Street, Courtroom 21D
New York, NY 10007

Re: Moore, et al. v. Navillus Tile, Inc., et al., 14-CIV-8326 (CM)(JLC)

Dear Judge Cott,

I write as counsel to Defendants Navillus Tile, Inc., Donal O'Sullivan ("Mr. O'Sullivan"), and Helen O'Sullivan (collectively, "Defendants") in the above-referenced case regarding Plaintiffs request for an Order requiring Defendants to identify the time and date of the text messages reviewed from the telephone of Donal O'Sullivan.

At the last teleconference on this topic, Your Honor noted:

I'm inclined to direct [Defendants] to produce the report to you, and I'm inclined, to the extent necessary, to have [Defendant's counsel] so state in an affidavit that his review confirmed that these text messages and iChat messages were not related to the business of ACS, and as far as I'm concerned that should be the end of it.

(March 20, 2015 Teleconference, Pg. 6, attached hereto as Exhibit A). Directly after that teleconference, Defendant's counsel provided Plaintiffs with the forensic report and an affidavit stating that the undersigned reviewed all resident text messages and none were related to the business of ACS. This fact is entirely consistent with the unrefuted deposition testimony in this case that no ACS employee had exchanged or would have any reason to exchange text messages with Mr. O'Sullivan regarding the business of ACS. (E. Moriarty Tr. 326-328; W.O'Donnell Tr. 216; J. Kuefner Tr. 35.)¹

¹ Deposition transcripts are cited herein as ("[First Letter of Deponent's First Name] [Deponent's Last Name] Tr. [Page Numbers].")

JONES DAY

Joshua M. Grossman
April 14, 2015
Page 2

Although discovery was scheduled to conclude on March 23, 2015, Plaintiffs sent a subpoena to AT&T Mobility on March 13, 2015 for records of Mr. O'Sullivan's text messages, a request Plaintiffs never made to Defendants. Plaintiffs only asked Defendants to provide records of the telephone calls exchanged between Mr. O'Sullivan and various ACS employees, not text message records.

On April 3, 2015, Plaintiffs sent a letter noting that they had received the AT&T Mobility records, which unsurprisingly, given that in addition to being ACS employees they are also Mr. O'Sullivan's good friends, reflected that Mr. O'Sullivan had exchanged numerous text messages with ACS employees. Plaintiffs requested that Defendants provide the date and times of the messages reviewed by the undersigned. Given that discovery had concluded approximately two weeks prior and given Your Honor's direction at the March 20, 2015 teleconference, Defendants refused. Further, as the information Plaintiffs request will provide information only as to the text messages that remained resident on his cell phones as of last month when the review was conducted, such information will only reflect that Mr. O'Sullivan (like most people with cell phones) either did or did not delete text messages exchanged with certain individuals prior to the commencement of this lawsuit. We fail to see how this information can provide Plaintiffs with any basis to renew their request for his telephone to be reexamined by their chosen third-party vendor. Given that discovery has now been completed for twenty days, Plaintiffs never requested that Defendants provide Mr. O'Sullivan's text message records and waited until nearly a week before discovery was scheduled to conclude, Your Honor should deny this request.

Amazingly, Plaintiffs also for the first time on April 3, 2015 requested that Defendants produce all text messages (regardless of relevance to this lawsuit) between Mr. O'Sullivan and ACS employees after the commencement of this litigation. Defendants advised Plaintiffs that consistent with the position Plaintiffs have taken on post-commencement text messages, we would not produce the requested messages. (D. Hancock Tr. 227 (Ms. Jennik noted that she had not and would not produce three responsive text messages that Mr. Hancock provided to Plaintiffs' counsel since they were exchanged after the commencement of this litigation)).

Defendants request that Your Honor deny Plaintiffs request for a conference. To the extent Your Honor believes a conference is warranted, Defendants' counsel will be out of town on Thursday April 16th and Friday April 17th and will return on Monday April 20th.

JONES DAY

Joshua M. Grossman
April 14, 2015
Page 3

Very truly yours,

/s/ Joshua M. Grossman

Joshua M. Grossman

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
MOORE, et al., : Docket #14cv8326
 :
Plaintiffs, :
 :
- against - :
 :
NAVILLUS TILE INC., et al., :
 : New York, New York
Defendants. : March 20, 2015

----- :

PROCEEDINGS BEFORE
THE HONORABLE JAMES L. COTT,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: KENNEDY, JENNIK & MURRAY, PC
BY: THOMAS KENNEDY, ESQ.
SUSAN JENNIK, ESQ.
SERGE AMBROISE, ESQ.
113 University Place
New York, New York 10003

For Defendants - JONES DAY
Navillus Tile, Donal BY: JOSHUA GROSSMAN, ESQ.
O'Sullivan & Helen 222 East 41st Street
O'Sullivan: New York, New York 10017

For Defendant - BOND, SCHOENECK & KING, PLLC
Advanced Contracting BY: LOUIS DILORENZO, ESQ.
Solutions: ALLISON ZULLO GOTTLIEB, ESQ.
600 Third Avenue, 22nd Floor
New York, New York 1001661

Transcription Service: Carole Ludwig, Transcription Services
141 East Third Street #3E
New York, New York 10009
Phone: (212) 420-0771
Fax: (212) 420-6007

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

APPEARANCES (CONTINUED):

For Defendants - Times PECKAR & ABRAMSON. PC
Square Construction, BY: GREGORY R. BEGG, ESQ.
Inc. & Kevin O'Sullivan: 70 Grand Avenue
River Edge, New Jersey 07661

1
2 MR. KENNEDY: Well I believe, Your Honor, that the
3 response from the defendants was insufficient in a number of
4 ways, it didn't indicate how many messages they reviewed,
5 how many messages were retrieved from the phones, and that's
6 why, as his letter indicates and my letter indicates, as
7 well, I first said to the plaintiffs, well, if you've done a
8 technical extraction, allow us to review the report that was
9 produced in connection with these phones and we may decide
10 at that point not to go further with this request, although
11 we reserve the right to do that. And we think part of the
12 problem here is that the defendants took the position that
13 they would not produce the report that would give us details
14 of what it is was actually reviewed.

15 THE COURT: Well I'm inclined to direct them to
16 produce the report to you, and I'm inclined, to the extent
17 necessary, to have Mr. Goldsmith so state in an affidavit
18 that his review confirmed that these text messages and iChat
19 messages were not related to the business of ACS, and as far
20 as I'm concerned that should be the end of it. Now if you
21 think upon your review of their forensic examination there's
22 going to be some basis to reopen this question, obviously I
23 can't preclude that, but I'm not prepared on the record
24 before me, unless there is something I'm missing, to order
25 that you've asked because I'm not sure there's a basis to do